(14)

No. 98-678

IN THE

Supreme Court of the United States

LOS ANGELES POLICE DEPARTMENT,

Petitioner,

v.

UNITED REPORTING PUBLISHING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does California Government Code section 6254(f)(3) deny access to, and criminalize disfavored speech uses of, arrestee address information in public arrest records in violation of the First and Fourteenth Amendments and similar provisions of the California Constitution?

STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

Respondent, United Reporting Publishing Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF FOR RESPONDENT

STATEMENT

1. In 1968, the California Legislature enacted the Public Records Act ("Act") to ensure maximum public access to information concerning the conduct of the people's business.[1] Cal. Gov't Code §§ 6250, *et seq*. The preamble to the Act declares "access [to public records] is a fundamental and necessary right of every person in this state." Cal. Gov't Code § 6250. Under the Act, government records must be made public unless "exempt from disclosure by [the Act's] express provisions." Cal. Gov't Code § 6253(b).

As of January 1, 1983, the Act mandated "state and local law enforcement agencies shall make public . . . [t]he full name, current address, and occupation of every individual arrested by the agency[.]" Cal. Gov't Code § 6254(f)(1). The impetus behind this provision was the " 'closing of all records of police activity in apparent retaliation for critical press accounts in some cities.' " *County of Los Angeles v. Superior Court*, 18 Cal. App. 4th 588, 596-98 (1993).[2] The Act also required that other arrestee

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1. California allowed public inspection of government documents well before 1968. *See* Act of March 12, 1872, § 1032, printed in 1872 Cal. Pol. Code § 183 (repealed Aug. 29, 1968) (now Cal. Gov't Code §§ 6250, *et seq*.).

2. In *County of Los Angeles*, the court reviewed the legislative history behind Assembly Bill No. 909 (the original version of section 6254(f)), noting the California Newspaper Publishers Association sought "to expose to routine access by any interested member of the public such *current* police agency records as 'activity logs,' 'original entry' documents and police blotters as a means of permitting the public and the press to monitor local law enforcement." *Id*. at 596-97 (emphasis in original); *see also id*. at 596 n.12; 597 n.13. After California's governor vetoed AB 909 as being too broad, the bill was redrafted in Assembly Bill 277 and passed, creating section 6254(f).

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information be made public, such as the arrestee's physical description and birthdate, all charges against the arrestee, outstanding warrants, and parole or probation holds. Cal. Gov't Code § 6254(f)(1).

2. In September, 1995, the California Peace Officers Association sponsored Senate Bill ("SB") 1059 which was thereafter enacted. (Ct. App. Supplemental Excerpts of Record ("SER") 247-397.) SB 1059 amended section 6254(f) to require one requesting an arrestee address from arrest records to declare under penalty of perjury that the request is being made for a "scholarly," "journalistic," "political," or "governmental" purpose or by a licensed investigator for an "investigative" purpose. (Appendix to Petition for a Writ of Certiorari ("Pet. App.") 21a & n.7.) Cal. Gov't Code § 6254(f)(3).[3] The statute further requires a declaration that the arrestee address will not be used "directly or indirectly to sell a product or service. . . ." Section 6254(f)(3) thus restricts the availability and use of information in original, previously public arrest records, not government compilations of records as in *United States Department of Justice v. Reporter's Committee For Freedom of the Press*, 489 U.S. 749 (1989) ("*Reporter's Committee*").

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Section 6254(f) perpetuated the common law tradition of contemporaneous disclosure of arrest information "in order to prevent secret arrests and to mandate the continued disclosure of customary and basic law enforcement information. . . ." *Id.* at 598.

3. Petitioner raises for the first time privacy and safety interests of crime victims. Petitioner's failure to raise the alleged interests of victims in the courts below creates an inadequate record on this issue. United Reporting notes, however, that the legislative history of SB 1059 contains no evidence of privacy invasion or safety problems. Further, crime victims presumably benefit from information they receive from direct mail just as arrestees benefit (as discussed below). In any event, section 6254(f) and subdivision (f)(2) allow for nondisclosure of a victim's name or address where the safety of that individual is endangered.

A violation of section 6254(f)(3) is punishable as perjury with potential imprisonment for two, three, or four years. *See* Cal. Penal Code §§ 118, 126 (West 1999). Moreover, for purposes of establishing perjury, "[a]n unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." Cal. Penal Code § 125 (West 1999).

SB 1059's ostensible purpose was to reduce the cost of informational requests to government agencies. (*See, e.g.*, SER 305.) The legislative history, however, does not explain how criminalizing some uses of arrestee addresses could save money since the information has to remain available for the many other uses permitted by the statute.[4] (Pet. App. 18a.) The legislative history also notes throughout that law enforcement believes commercial users of arrest information improperly "seek to profit" from the misfortune of arrestees. (*See* SER 309.)

In opposing SB 1059, the California First Amendment Coalition argued arrestee address information is "essential" to follow up on arrests, detect crime patterns and obtain other crime-related information that is "increasingly hard to come by from law enforcement agencies directly." (SER 382; *see also* Ct. App. Excerpts of Record ("ER") 561-63.) Address specifics are likewise typically the only way to "avoid confusing the identities of people with common names" (SER 382), or to ascertain who has been arrested when a name alone is not sufficient identification. Other opponents of SB 1059 argued increased competition through direct mail reduces routine legal and other fees incurred by arrestees. (SER 380-81; *see also* Steven R. Cox, Allan C. DeSerpa, & William C. Canby, Jr., *Consumer Information and the Pricing of Legal Services*, 30 J. Indus. Econ. 305 (1982) (included in SER 53-60).)

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4. Moreover, as California's legislature recognized in 1982 and 1983, *see* Legis. Hist. for AB 909, at 39, 41, 43-44 and AB 277 at 221, costs of record retrieval or duplication can be recouped through provisions of the Public Records Act. *See, e.g.*, Gov't Code § 6253(b).

3. United Reporting is a publishing service that provides its subscribers the names and addresses of recently arrested individuals, as well as other information, from public arrest records. (Pet. App. 11a.) United Reporting publishes a newsletter, the "*Register*," for subscribers and arrestees that contains articles on legal and political subjects and lists the names and addresses of persons arrested. (*See* ER 195-202.) United Reporting's subscribers include attorneys, insurance companies, drug and alcohol counselors, religious counselors, and driving schools. (Pet. App. 11a; *see, e.g.*, ER 193; 206, 213, 215-31, 233, 240-45.) United Reporting's subscribers use the data it provides to send arrestees counseling offers as well as information regarding statutory and regulatory guidelines, the specific charges the arrestee faces and the arrestee's legal rights. (*Id.*; *see, e.g.*, ER 206 (offering a free insurance consultation and providing a pamphlet explaining administrative procedures and programs to reacquire driver's license after a DUI charge); ER 215-31 (offering free legal consultation and brochure on California gun laws); ER 240-45 (explaining post-arrest legal process and offering free legal consultation).) Arrestees believe the information they receive from United Reporting's subscribers is valuable. (*See, e.g.*, ER 249-50 (letters addressing administrative procedures helped arrestee preserve driving privileges, obtain free legal consultations, and learn about attorneys' qualifications and fees); ER 252 (same).)

4. On May 15, 1996 (after enactment of section 6254(f)(3) but before its effective date of July 1, 1996), United Reporting filed a complaint under 42 U.S.C. § 1983 for declaratory and injunctive relief against the California Attorney General. The complaint alleged the statute violates the United States and California Constitutions. (ER 1-14; Pet. App. 25a-26a.) On June 7, 1996, the district court heard argument on the injunction. The court found "this code section appears to permit civil or criminal prosecution of anyone using such information [arrestee addresses] for commercial purposes." (ER 258.) The court denied injunctive relief but obtained the Attorney General's

commitment "(i) not to withhold any section 6254(f) information from [United Reporting] and (ii) not to prosecute any commercial use of such information by [United Reporting]." (*Id.*)

5. On July 1, 1996, police and sheriff departments statewide denied United Reporting access to public records containing arrestee addresses because its employees could not sign section 6254(f)(3) declarations. (ER 370-74, 378-80, 381-87, 486-523.) United Reporting thereafter filed an amended complaint against those agencies seeking declaratory and injunctive relief. After being served with the amended complaint, most law enforcement agencies stipulated to continue providing full arrest record information to United Reporting pending the resolution of the lawsuit. Only the California Highway Patrol, the Sheriff's Department for the County of San Diego, California, and Petitioner continued to defend the lawsuit. (*See* ER *passim*.)

6. The parties filed cross-motions for summary judgment. The California Attorney General maintained section 6254(f)(3) was enacted to save money. (*See, e.g.*, ER 553 (the legislative purpose was "controlling the cost to government of providing records for commercial use"); *see also* ER 567.) Nonetheless, no government entity produced evidence of cost-savings when requested to do so by the district court. (Pet. App. 18a; SER *passim*.) In contrast, United Reporting established that law enforcement agencies contract to provide public arrest information to entities such as United Reporting for a price that may include a profit. (SER 639-53; ER 192.) Petitioner (but not the Attorney General) also argued section 6254(f)(3) was enacted to protect arrestees' privacy rights. Petitioner produced no evidence that any privacy invasion had existed before the statute's enactment.[5] (Pet. App. 18a; SER *passim*.)

5. Ironically, the California Legislature also passed laws publicizing the identities of juveniles charged with serious or violent

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7. On November 27, 1996, the district court granted United Reporting's motion for summary judgment. (ER 705-17.) The court ruled the state "functionally" imposes a limitation on commercial speech. (Pet. App. 14a.) The district court noted "[t]he government is the only source of this information [arrestee addresses] and by statute is disseminating it to everyone except commercial users." Section 6254(f)(3) has thus created "a content-based indirect limitation on commercial speech which implicates the First Amendment." (Pet. App. 14a, 16a.) The district court thereafter applied the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) ("*Central Hudson*"). (Pet. App. 16a.) The court accepted as substantial the asserted state interests in minimizing costs and protecting arrestee privacy. (Pet. App. 17a.) Nevertheless, the court found it "doubtful" section 6254(f)(3) could reduce costs, as arrestee addresses must be made available for the statutorily approved uses even if commercial uses are prohibited. (Pet. App. 18a.) In any event, the district court noted, any expense attributable to commercial speech could be charged to those users, thereby eliminating the cost issue without infringing speech. (Pet. App. 18a & n.5.)

The district court also found the purported governmental interest in protecting arrestee privacy was belied by the "potentially much more pervasive invasions of privacy" permitted by section 6254(f)(3), including having one's name and address "published in newspapers, broadcast on television, and/or obtained by an employer or even an enemy." (Pet. App. 21a.) The statute's "exceedingly narrow scope," the court concluded, betrays its true purpose: to prevent government disapproved solicitation of arrestees. (Pet. App. 20a-21a.) Arrestees may need immediate legal assistance and the "statute

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felonies by requiring public court proceedings. *See KGTV Channel 10 v. Superior Court*, 26 Cal. App. 4th 1673, 1677-79 (1994). Petitioner itself argued for publication of the names and photographs of those arrested for prostitution in Los Angeles. (SER 67.)

may . . . have been intended to prevent arrestees from obtaining counsel because law enforcement agencies find it easier to deal with arrestees who are not represented by counsel." (Pet. App. 19a, 21a & n.7.) Arrestees' interest in the information provided by United Reporting and its subscribers "so heavily outweighs any concern that arrestees may find such attorney solicitations offensive that the [government's] justification borders on the disingenuous." (Pet. App. 19a.)

8. Following entry of the district court judgment, the California Highway Patrol and the County of San Diego settled with United Reporting, paying its attorneys' fees and costs. Petitioner, but not the California Attorney General, appealed to the Ninth Circuit. (Pet. App. 26a n.1.) On appeal, petitioner waived its cost-savings argument. (Pet. App. 30a.) Petitioner instead urged the state's interest in protecting arrestee privacy and asserted a new interest: preventing the creation of unreliable criminal history data banks. (Pet. App. 32a-33a.)

The Ninth Circuit summarily rejected United Reporting's argument that its speech constituted noncommercial (or mixed) speech and accepted both asserted state interests as substantial. (Pet. App. 29a.) Nonetheless, the court found section 6254(f)(3) does not advance either interest "in a direct and material way." (Pet. App. 31a.) Specifically, the Ninth Circuit found "no evidence whatsoever" that commercial interests were likely to create unreliable information banks. (Pet. App. 32a.) The court likewise noted that the many uses of arrestee addresses permitted by section 6254(f)(3) belie any claim the statute protects arrestee privacy. (Pet. App. 33a.) Rather, section 6254(f)(3) "appears to be more directed at preventing solicitation practices." (Pet. App. 33a.) The court declined to accord that goal great weight. (Pet. App. 33a (citing *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) ("The [privacy] invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery [through a targeted direct-mail solicitation].").) Arrestees and not the government,

the court concluded, must decide whether solicitations are unwanted. (Pet. App. 33a.)

The Ninth Circuit also held the "myriad of exceptions" to section 6254(f)(3) preclude the statute from directly and materially advancing the government's purported privacy interest and "render the statute unconstitutional under the First Amendment." (Pet. App. 34a, 35a.) After all, "[h]aving one's name, crime, and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome [one's] present difficulties (for a fee, naturally)." (Pet. App. 35a.)

SUMMARY OF ARGUMENT

Before the enactment of Government Code section 6254(f)(3), arrest records in California — by tradition and statute — were open to the public. Section 6254(f)(3), legislation sponsored by law enforcement, criminalizes the use of arrestee addresses from public arrest records to sell a product or service "directly or indirectly." The statute continues to allow the use of arrestee addresses only for certain enumerated but undefined purposes. Both the statutory language and legislative history show section 6254(f)(3) was enacted to deter commercial solicitation of arrestees by entities such as United Reporting's subscribers. The issue before the Court is the constitutionality of this statute. What is not before the Court is the propriety of other state or federal laws restricting the use of other types of governmental information.

As the courts below concluded, section 6254(f)(3) is a content-based restraint on speech, not a mere access restriction. The statute makes it a crime to use arrestee addresses obtained from public arrest records for certain disfavored speech. Accordingly, section 6254(f)(3) implicates the First Amendment and must be subjected to heightened scrutiny.

Both courts below analyzed section 6254(f)(3) as a restriction on commercial speech that must pass the four-part test set forth in *Central Hudson*. The state interests that assertedly justify section 6254(f)(3) have changed throughout this litigation. Petitioner now cites the state's interests in protecting arrestee privacy, keeping the public informed and preventing discrimination against arrestees. These alleged state interests are pretextual. In any event, section 6254(f)(3) allows far more serious invasions of privacy than those caused by an arrestee's receipt of unwanted mail. Moreover, the record establishes that the information sent by United Reporting and its subscribers is valuable to arrestees and assists them in protecting their Fifth and Sixth Amendment rights. Thus, as was true in *Greater New Orleans Broadcasting Ass'n v. United States* ("*Greater New Orleans*"), 119 S. Ct. 1923 (1999), section 6254(f)(3) cannot possibly advance the interests asserted to justify it. Further, there are several alternatives available that do not infringe First Amendment rights, including solicitation opt-out provisions, that could accomplish the state's purported goals. Thus, section 6254(f)(3) cannot pass muster under *Central Hudson*.

Section 6254(f)(3) also restrains substantial noncommercial speech and cannot survive strict scrutiny. Indeed, the Court found unconstitutional a similar statute in *Regan v. Time, Inc.*, 468 U.S. 641 (1984). Section 6254(f)(3) also unconstitutionally conditions receipt of a government benefit (access to public information) on the surrendering of speech rights (i.e., the right to solicit). The statute also unconstitutionally criminalizes the accurate publication of information from public records in violation of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) and is an unlawful prior restraint on speech.

Section 6254(f)(3) is unconstitutional even if it is viewed as a restriction on access as opposed to a content-based restraint on speech. The public has a fundamental interest in the operation of the criminal justice system. As a matter of tradition and to

preserve citizens' ability to scrutinize the activities of law enforcement personnel, arrest records historically have been open to the public. Based on that tradition and its importance in our democratic society, this Court should hold that there is a First Amendment right of access to arrest records that cannot be infringed absent a compelling state interest, an interest that is absent here. In any event, the selective disclosure of public information based on the speaker's identity has never passed constitutional muster.

Finally, section 6254(f)(3) violates the Fourteenth Amendment equal protection and due process guarantees as well as the California Constitution. This Court should affirm the holding of the Ninth Circuit Court of Appeals that the statute is unconstitutional.

ARGUMENT

I. SECTION 6254(f)(3) IS A CONTENT-BASED RESTRICTION ON SPEECH THAT VIOLATES THE FIRST AMENDMENT.

A. Section 6254(f)(3) Restrains Speech by Criminalizing the Use of Arrest Information for Specific Disfavored Speech.

Petitioner's central premise is that section 6254(f)(3) is a mere restriction on access to government documents. On its face, however, the statute prohibits the use of arrestee addresses from public arrest records — even if lawfully obtained — "directly or indirectly" to sell a product or service. Section 6254(f)(3) thereby criminalizes the use of lawfully obtained information for specific disfavored speech, creating a content-based speech restraint like the ban on commercial newsracks invalidated in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) ("Cincinnati").

Petitioner argues United Reporting can obtain arrestee addresses from "other sources." (Brief for the Petitioner at 9.) Practically speaking, however, there is no source other than the original arrest records. In this regard, this case is wholly unlike *Reporter's Committee*, 489 U.S. 749, in which the issue was government compilations of source documents, not the source documents themselves. Further, cost constraints and the likelihood of errors render it impractical (perhaps impossible) to discover independently the addresses of arrestees, particularly those with common names or who are arrested in large metropolitan areas.[6] At a minimum, such an independent search would take time, thus delaying the arrestees' receipt of valuable information about their constitutional rights. Moreover, contrary to Petitioner's assertion that the California Legislature could legitimately curtail inexpensive, more effective direct mail for solicitation of arrestees, the First Amendment's protection "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 296 (1981) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam)).

Section 6254(f)(3) also restrains speech by limiting the use of previously public information to certain government-approved speech. Thus, a reporter can lawfully use arrestee address information from public records to write a newspaper article (approved speech), but a suburban resident cannot obtain and use such information to tell her neighbors about an area arrest (disapproved speech). A law professor can use arrestee address information in a classroom lecture or to write a law review article (approved speech), but a church or drug counselor cannot obtain and use the information to offer spiritual or drug

6. Even Petitioner acknowledges the important identification function of arrest information. (Brief for the Petitioner at 34.) Ironically, section 6254(f)(3) — by foreclosing the most reliable source of accurate arrestee address information — increases the likelihood of mistaken identity.

counseling to arrestees (disapproved speech). Arrestees themselves cannot obtain and use the addresses of other arrestees to investigate police discrimination or abuse.

Not surprisingly, every federal court considering the issue has concluded that where a state conditions access to public records on the requester's agreement not to engage in commercial speech, the First Amendment is implicated. In fact, the Ninth Circuit's holding that section 6254(f)(3) is a content-based commercial speech restriction is in accord with the decisions of the Fifth, Sixth, Tenth and Eleventh Circuits.[7] (Pet. App. 29a-36a (applying the *Central Hudson* test).) In *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994), the court criticized statutes such as section 6254(f)(3) for criminalizing the *use* of information for disapproved speech under the guise of punishing the act of *obtaining* it. *See id.* at 1298. This interpretation, the *Speer* court found, explained the Eleventh

7. *See Speer v. Miller*, 15 F.3d 1007, 1010 (11th Cir.) (First Amendment challenge appropriate where state prohibits the use of public records for non-misleading, truthful commercial speech), *on remand*, 864 F. Supp. 1294, 1296 (N.D. Ga. 1994) (discussed in text); *see also Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512-13 (10th Cir.), *cert. denied*, 513 U.S. 1044 (1994) (state-drawn line based on the speech use of public records created content-based speech restriction); *Moore v. Morales*, 843 F. Supp. 1124, 1130-31 (S.D. Tex. 1994) (by restricting access to certain classes of individuals, the state is in effect thwarting the means by which solicitation is conducted), *rev'd in part*, 63 F.3d 358 (5th Cir. 1995); *Innovative Database Sys. v. Morales*, 990 F.2d 217, 221 (5th Cir. 1993) (ban on the use of lawfully acquired public information for solicitation is unconstitutional); *Amelkin v. McClure*, 168 F.3d 893, 897 (6th Cir. 1999) (statutory restriction prohibiting press from using accident reports obtained for a commercial purpose is content-based restriction violating the First Amendment), *aff'g, Amelkin v. Commissioner, Dept. of State Police*, 936 F. Supp. 428 (W.D. Ky. 1996); *Lavalie v. Udall*, No. 94-0404-M Civil (D.N.M. Feb. 16, 1996) (included in SER at 549-58) (state statute aimed at suppressing solicitation invalid under First Amendment); *Babkes v. Satz*, 944 F. Supp. 909, 911 (S.D. Fla. 1996) (by restricting the use to which public arrest information can be put, statute implicates the First Amendment).

Circuit's finding before remand that the statute implicated the First Amendment:

> The State does not restrict all (or probably even most) possible invasions of a person's privacy. . . . Only entities intending to use the names and addresses of those mentioned therein to solicit those people or their relatives for commercial purposes are denied access. The restriction's exceedingly narrow scope betrays it as a statute designed not to protect privacy but, instead, to prevent solicit[ation] practices.

Id. at 1302. Even in *Lanphere*, 21 F.3d at 1516-20, the Tenth Circuit found Colorado's statute is content-based because it conditions access to public arrest records on whether the intended speech is commercial. *See id.* at 1513 & n.2 (quoting *Rust v. Sullivan*, 500 U.S. 173 (1991)) (analogizing the statute to a "case of a general law singling out a disfavored group on the basis of speech content"). Censorship is particularly abhorrent when the information suppressed is beneficial to the would-be recipient — in this case, arrestees whose liberty and property rights are at risk. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976) ("*Virginia Pharmacy*"); *Cincinnati*, 507 U.S. at 419-20 (regulations that suppress entire modes of commercial speech are reviewed with special care).[8]

8. The government program at issue in *Rust v. Sullivan*, 500 U.S. 173 (allowing government to subsidize family planning that prohibits abortion counseling and related services), did not involve targeting a disfavored group on the basis of speech, and *Rust* therefore does not support Petitioner's position. *Accord Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 553 (1983) ("*TWR*") (Blackmun, J., concurring) (distinguishing between government subsidized lobbying through a tax exemption (allowed) versus controlling the ability to lobby (creating "insurmountable" First Amendment problems)); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2178-79 (1998) (upholding government grant program, but noting that government may not impose a disproportionate financial burden calculated to drive certain viewpoints from the marketplace).

Section 6254(f)(3) is intended to (and does) penalize certain (*i.e.*, commercial) speech. Accordingly, the statute must, *at a minimum*, withstand heightened intermediate scrutiny. In fact, since the statute penalizes substantial noncommercial speech — legal, medical, religious, literary, scientific, philosophical and artistic speech to cite only a few examples — it should be subject to strict scrutiny. *See Carey v. Brown*, 447 U.S. 455, 465 (1980) (applying strict scrutiny under the Fourteenth Amendment to invalidate ordinance distinguishing between labor and all other peaceful picketing) and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 748-85 (1978) (applying strict scrutiny to a statute abridging free speech rights under First and Fourteenth Amendments). *Accord Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (applying strict scrutiny to a law applying in practice only to conduct protected by the First Amendment); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (applying strict scrutiny when the circumstances suggest that enforcement of a general law regulating conduct targets particular speech); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 572-73 (1995) (applying strict scrutiny where law applied to expressive activity with apparent intent to require speakers to modify content of expression).

Petitioner erroneously contends United Reporting has no standing to assert the speech interests of its clients or to attack section 6254(f)(3) on its own behalf on an "as applied" basis. (Brief for the Petitioner at 15.) *See Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) and *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (litigants may challenge a statute because of a judicial assumption the statute's existence may cause others to refrain from constitutionally protected speech or expression); *Winters v. New York*, 333 U.S. 507, 515 (1948) (where statute imposes criminal penalties, facial challenges are more readily permitted); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (where plaintiff has alleged an intention to engage in proscribed conduct arguably affected with a

constitutional interest, he is not required to undergo a criminal prosecution to seek relief). The record is clear that United Reporting publishes the *Register* and provides arrestee names and addresses to its subscribers, that its owner and employees were denied arrestee addresses because they could not declare under penalty of perjury that these uses qualify as "journalistic" under section 6254(f)(3) (which nowhere defines the term) and further, that if they sent the *Register* to their subscribers and arrestees, it would not "directly or indirectly" result in the sale of a product or service. In any event, United Reporting desires to use arrestee addresses to sell its products and services directly — speech specifically prohibited by section 6254(f)(3).

Thus, United Reporting has standing to challenge section 6254(f)(3) on its face and as applied, as well as on behalf of its subscribers. It also has standing to assert directly the arrestees' First, Fifth and Sixth Amendment rights (discussed *infra*). *See Craig v. Boren*, 429 U.S. 190, 195 (1976) (beer vendor had standing to challenge statute prohibiting sales to males, but not to females, thereby requiring vendor to violate the males' equal protection rights); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (attorney could challenge a forfeiture statute on behalf of his client where attorney had a stake in assets and the statute might materially impair the ability of individuals to exercise their Constitutional rights).

B. Section 6254(f)(3) Cannot Pass the *Central Hudson* Test.

1. Commercial Speech Restrictions Are Subject to Heightened Intermediate Scrutiny Under *Central Hudson*.

United Reporting denies its speech is "commercial" speech. Nevertheless, since the lower courts applied *Central Hudson* to section 6254(f)(3), United Reporting addresses this argument first.

In *Virginia Pharmacy*, 425 U.S. 748, the Court first extended constitutional protection to commercial speech. That protection extends to "the communication, to its source, and to its recipients[.]" *Id.* at 756, 765. In 1996, the Court held commercial speech restrictions are subject to heightened intermediate scrutiny. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500-01 (1996); *see also Greater New Orleans*, 119 S. Ct. at 1929 (1999).[9]

The extension of First Amendment protection to commercial speech reflects the Court's recognition that "commercial messages play[ ] a central role in public life," and that constitutional safeguards ensure consumer access to accurate information about goods and services. *44 Liquormart*, 517 U.S. at 495-96; *Rubin v. Coors Brewing*, 514 U.S. 476, 481-82 (1995); *Virginia Pharmacy*, 425 U.S. at 763-65. (*See also* Brief of Amici The Direct Marketing Association *passim*.) In *Virginia Pharmacy*, the Court emphasized that governmental paternalism is inconsistent with the First Amendment and that people can determine their own best interests if they are informed through open channels of communication. *Id.* at 770.

Based on its determination that commercial speech is vital to an informed public, the Court has invalidated bans on truthful, nonmisleading direct mail solicitation by lawyers and other professionals.[10] *See Bates*, 433 U.S. at 383. More recently, the

9. Four Justices of this Court appear to apply a presumption of invalidity to content-based restrictions on truthful, non-misleading commercial speech. *See 44 Liquormart*, 517 U.S. at 503-04 (principal opinion by Stevens, J.; Kennedy & Ginsburg, JJ., joining in Part IV of the opinion) (curtailing access to truthful information for any purpose may "serve only to obscure 'an underlying governmental policy,' " and "impede debate over central issues of public policy"); *id.* at 518 (Thomas, J., concurring).

10. *See In re Primus*, 436 U.S. 412 (1978) (reversing sanctions against an attorney who informed a victim of her legal rights regarding (Cont'd)

Court invalidated a federal prohibition on truthful advertising about privately operated gambling casinos. *See Greater New Orleans*, 119 S. Ct. at 1926. The presumption is that "the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct." *Id.* at 1935-36 (citing *Edenfield*, 507 U.S. at 767). Restrictions on truthful commercial messages often obscure an underlying governmental policy that is improper or could be implemented without burdening speech. *See 44 Liquormart*, 517 U.S. at 503. As Justice Thomas observed in *44 Liquormart*:

> In case after case following *Virginia Pharmacy Bd.*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing

(Cont'd)
government-mandated sterilization); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) (reversing state discipline of an attorney for newspaper advertisements promoting his services for certain cases); *Shapero*, 486 U.S. at 473 (protecting truthful, nondeceptive letters to potential clients facing particular legal problems); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 101 (1990) (upholding attorneys' right to advertise legal certifications); *In re R.M.J.*, 455 U.S. 191, 203-05 (1982) (protecting attorney advertising that was not "inherently misleading" or proven by experience to be subject to abuse); *see also Edenfield v. Fane*, 507 U.S. 761 (1993) (protecting in-person solicitation by accountants); *Carey*, 431 U.S. at 700-02 (protecting advertising regarding contraceptives); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (protecting advertising regarding abortions). *Cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding temporal ban on attorney solicitation of accident victims).

> "commercial" speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.

Id. at 520.

In *Central Hudson*, 447 U.S. 557, the Court held that whether First Amendment protection extends to commercial speech depends on whether: (1) the speech concerns lawful activity and is not misleading; and (2) regulation of the speech is supported by a substantial government interest. If both (1) and (2) are established, the First Amendment requires the government to demonstrate: (3) the harms it cites are real and the speech restriction will materially alleviate them; and (4) the restriction is no more extensive than necessary. *Id.* at 566; *Edenfield*, 507 U.S. at 767. Petitioner contends *Central Hudson* only applies to direct restrictions on speech. (Brief for the Petitioner at 11-16, 32-33.) Section 6254(f)(3), however, does directly restrict speech, as discussed above. In any event, the notion that *Central Hudson* is limited to direct speech restraints is disproven by Petitioner's own cited cases. *See, e.g., Cincinnati*, 507 U.S. at 424, 428 (invalidating a public forum restriction on commercial newsstands that rested on no more than a "bare assertion that the 'low value' of commercial speech [was] a sufficient justification for [a] selective and categorical ban"). *See also Grosjean v. American Press*, 297 U.S. 233, 250 (1936) (the discriminatory effect or impact of a statute — even one with a legitimate purpose — may violate the First Amendment); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (same regarding increasing the cost of free expression); *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 502 U.S. 105, 116-17 (1991) (same regarding imposing a financial disincentive on speech).

In *Cincinnati*, the Court made clear that Cincinnati's categorical ban on commercial speech was unconstitutional

because it elevated noncommercial over commercial speech, a distinction that bore "no relationship whatsoever to the particular interests that the city" asserted. *Cincinnati*, 507 U.S. at 425. The Court further suggested that commercial speech might be entitled to "lesser protection" only when it is aimed "at either the content of the speech or the particular adverse effects stemming from that content," and otherwise must be subject to strict scrutiny. *Id.* at 416 n.11. In any event, section 6254(f)(3) cannot even pass the *Central Hudson* test.

2. Section 6254(f)(3) Fails the *Central Hudson* Test.

a) United Reporting's Speech Concerns Lawful Activity and Is Not Misleading.

Petitioner concedes United Reporting's speech concerns lawful activity and is not misleading. (Pet. App. 30a.)

b) Petitioner Did Not Establish Any Substantial State Interest Supporting Section 6254(f)(3).

The government bears the burden of identifying a substantial interest and justifying the challenged restriction. *See Greater New Orleans*, 119 S. Ct. at 1930; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). Otherwise, a state "could with ease restrict commercial speech in the service of other objectives." *Edenfield*, 507 U.S. at 768, 771. Here, Petitioner fails to meet its burden to show any legitimate — much less "substantial" — state interest justifying the significant speech restrictions imposed by section 6254(f)(3).

Petitioner defends section 6254(f)(3) by asserting the state's interest in "protecting the privacy of arrestees [while] keeping the public informed" and in preventing commercial interests from discriminating against arrestees. (Brief for the Petitioner at 33.) The state interests Petitioner now asserts are different from those reflected in the legislative history, which were

different from those asserted at the district court, which were different from those argued at the Ninth Circuit. Surely if section 6254(f)(3) advanced a legitimate and substantial state interest, there would be less confusion as to what that interest is.

The legislative history of section 6254(f)(3) reflects three ostensible motivations for its enactment. First, the legislature made a value judgment that solicitation of arrestees is unseemly. (SER 305, 309.) This judgment hardly embodies a substantial state interest; indeed, it is a viewpoint-based determination that is constitutionally intolerable. (*See* page 23 and note 15, *infra*.) Second, the legislative history reflects the desire to control the costs "of providing records for commercial use." (ER 553.) The district court rejected that justification and Petitioner waived it on appeal. Third, the legislative history reflects discussion about arrestee privacy, an interest argued at the district court by Petitioner (without supporting evidence) ***but not by the California Attorney General***.[11] Petitioner also argued on appeal the need to prevent commercial databanks. It has apparently abandoned that argument, urging only variations on the arrestee privacy theme and now adding the state's alleged interest in keeping the public informed. These shifting justifications for section 6254(f)(3) suggest pretext, not substantiality.

No evidence in the record supports the existence of any "solicitation invasion" problem; on the contrary, arrestee declarations establish the information they receive from United Reporting's subscribers is helpful. Further, any "invasion" an arrestee could theoretically experience from unwanted mail solicitations could be avoided by simply throwing them away or through opt-out alternatives. *See Bolger*, 463 U.S. at 72; *Martin v. City of Struthers*, 319 U.S. 141 (1943) (residents'

11. The Attorney General argued at the district court that section 6254(f)(3) "permits but does not require" law enforcement agencies to provide arrestee addresses for commercial speech purposes — an argument based on a cost rationale that disproves any state interest in protecting arrestee privacy. (ER 258.)

ability to refuse solicitations adequately protected privacy); 18 U.S.C. § 2721(d) (allowing individuals themselves to opt out of solicitations); Arizona Revised Statutes § 28-452.G.2 (1998) (same). (*See* other alternatives discussed in Brief of Amici Individual Reference Services Group, *passim*.) Even if an asserted state interest in arrestee privacy were legitimate, it would not be substantial. Both this Court in *Paul v. Davis*, 424 U.S. 693 (1976), and the California Supreme Court in *Loder v. Municipal Court*, 17 Cal. 3d 859 (1976), have held there is no legitimate interest in protecting an arrestee's identity. In fact, section 6254(f) *itself* makes public the name of every arrestee (and substantial other information),[12] and allows widespread dissemination of arrestee addresses, including publication, and unrestricted use by private investigators.[13]

Keeping the public informed and preventing discrimination against arrestees — the other two justifications Petitioner now

12. Section 6254(f)(1) requires that extensive arrestee information be made public including full name, occupation, physical description, date of birth, hair and eye color, sex, height, weight, time and date of arrest, time and date of booking, location of arrest, factual circumstances surrounding arrest, amount of bail set, time and manner of release or location where the arrestee is being held, all charges, outstanding warrants, and parole or probation holds.

13. Even arrest warrant information published by California law enforcement agencies on the Internet contains the suspect's last known address. *See, e.g., Amador County Sheriff's Office, Amador County's Most Wanted* (visited June 25, 1999) <http://www.sheriff.co.amador.ca.us/wanted.html>; *Santa Barbara County Sheriff's Department Most Wanted* (visited June 24, 1999) <http://www.sbsheriff.org/mw/index.html>; *Wanted by Los Angeles County Sheriff's Department* (visited June 25, 1999) <http://www.mostwanted.org/CA/LASheriff/>; *see also FOIC orders Hartford police to release arrest record* (visited June 24, 1999) <http://www.access.uconn.edu/061423.html> (arrestee name and address information compelled to be disclosed under the Freedom of Information Act) (printed copies of Internet sites on file with counsel). Of course, all pre-conviction (as well as post-conviction) criminal proceedings are public.

asserts — could be substantial state interests in some context. Section 6254(f)(3), however, *restricts* public access to arrest information and does not address discrimination. These asserted interests are simply eleventh hour rationales for a statute intended to accomplish one primary goal: preventing solicitation of arrestees.

This Court should hold that pretextual state interests are not substantial. The government has *no* legitimate interest in depriving consumers of truthful, non-misleading information "so as to thwart what would otherwise be their [lawful] choices in the marketplace."[14] *44 Liquormart*, 517 U.S. at 518, 523 (Thomas, J., concurring) (urging such censorship should be "per se illegitimate"); *see also id.* at 495-500 (Stevens, J., joined by Kennedy, Souter, & Ginsberg, JJ.), 501-04 (Stevens, J., joined by Kennedy & Ginsburg, JJ.), 509 (Stevens, J., joined by Kennedy, Thomas & Ginsberg, JJ.) (finding censorship to influence consumer behavior troubling from a First Amendment standpoint and noting the Court's "longstanding hostility to commercial speech regulation of this type").

c) Section 6254(f)(3) Does Not Advance the State's Purported Interests in a Direct or Material Way.

Petitioner has also failed to meet its burden of showing section 6254(f)(3) materially advances the purported state interests. *See Edenfield*, 507 U.S. at 771 (the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"). This element cannot be established with speculation and conjecture, especially when "the State takes aim at accurate commercial information for paternalistic ends."

14. *Accord Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 96-97 (1977) (ordinance forbidding "For Sale" and "Sold" signs to manipulate residents' conduct held unconstitutional); *Bates*, 433 U.S. at 375 (lawyer advertising restriction held unconstitutional where (among other things) it rested on "the benefits of public ignorance").

44 Liquormart, 517 U.S. at 507 (Stevens, J., joined by Kennedy, Souter, & Ginsberg, JJ.) (citing *Edenfield*, 507 U.S. at 770).

Section 6254(f)(3) is both overinclusive and underinclusive. Most obviously, the statute cannot possibly protect arrestee privacy or prevent discrimination as it allows widespread access to, and dissemination of, arrestee addresses for "journalistic," "scholarly," "political," or "governmental" purposes. It also permits unrestricted use of arrestee addresses by a private investigator, thereby indirectly allowing use by citizens who can afford such an expense. In fact, section 6254(f)(3) does not prohibit *any* specific use of arrestee address information lawfully obtained — regardless how invasive or embarrassing — *except to sell a product or service*. This Court has never upheld a complete ban on solicitation based on the recipient's privacy interests. As the Court held in *Greater New Orleans*, 119 S. Ct. at 1933, and *Rubin*, 514 U.S. at 487-91, a government regulation that is irrational — especially where exceptions undermine its purpose — *cannot* advance the asserted state goals.

Section 6254(f)(3) also discriminates even among commercial users based on viewpoint. The statute allows commercial speech uses of arrestee addresses where it approves of the speaker and message — such as commercial speech by a private investigator or scholar — but not where it disagrees with the speaker or the message, such as solicitation by United Reporting's subscribers.[15] *See Greater New Orleans*, 119 S. Ct. at 1934 (noting that "the Government presents no convincing

15. The First Amendment precludes viewpoint manipulation. *Consolidated Edison Co.*, 447 U.S. at 546 (Stevens, J., concurring) (a regulation of speech motivated by nothing more than a desire to curtail expression of a particular point of view abridges free speech); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (government discrimination against private speech based on viewpoint is constitutionally intolerable); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) ("[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment[.]").

reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos").

Section 6254(f)(3) is also fatally overinclusive. *Any* speech may fall within the statute's prohibition if the speaker's intent, even in part, is ultimately to sell a product or service "directly or indirectly." Section 6254(f)(3) thereby sweeps in substantial noncommercial speech. For example, United Reporting's newsletters (erroneously classified as commercial speech by the Ninth Circuit) contain information vital to an arrestee's liberty, property and constitutional rights. Because those newsletters may indirectly be involved with the sale of a product or service, however, they may fall within section 6254(f)(3)'s prohibition. As the court concluded in *Speer v. Miller*, 864 F. Supp. 1294, 1301 (N.D. Ga.), *on remand from* 15 F.3d 1007 (11th Cir. 1994) (overruling Georgia's similar statute), such statutes are unconstitutionally overbroad as they restrict access to information not only to "corrupt attorneys but also to honest attorneys, honest health care providers and other honest solicitors. . . ." *Id.* at 1301. *Accord Greater New Orleans*, 119 S. Ct. at 1935 (considering the "scope of speech" proscribed and the fact that messages "unlikely to cause any harm at all" were banned, regulation could not survive).

Notably, section 6254(f)(3)'s legislative history contains no evidence that arrestees desire to have law enforcement protect their privacy. On the contrary, the legislative history shows the state unilaterally chose to ban informational and commercial speech directed at arrestees at the expense of their rights. (*See* ER 249-252.) Petitioner's position is tantamount to arguing that a gravely ill person should be spared information about possible treatment or that a pregnant woman appreciates a lack of prenatal care information.[16] Section 6254(f)(3) in effect allows

16. Petitioner's reliance on *Florida Bar*, 515 U.S. 618 (upholding a temporal ban on commercial solicitation of personal injury or wrongful death clients) ignores that arrestees and accident victims have very different privacy interests.

the government to erect a wall around an arrestee's mailbox, whether the arrestee wants the wall or not. *See Rowan v. United States Post Office Dept.*, 397 U.S. 728, 736 (1970) (a sufficient measure of individual autonomy must survive to permit every household to exercise control over unwanted mail). Not surprisingly, the district court questioned whether section 6254(f)(3) was actually intended to deny arrestees helpful information law enforcement would prefer they not have. (Pet. App. 21a.)

Criminal defendants are benefited, not harmed, by a clear understanding of their constitutional rights and privileges and the availability of legal counsel. *See Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (the defendant "requires the guiding hand of counsel at every step in the proceedings against him") (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)); *Miranda v. Arizona*, 384 U.S. 436 (1966). Section 6254(f)(3) — by prohibiting the most efficient, direct and inexpensive method of communicating with arrestees — undermines the arrestee's right to choose counsel. *See Ficker v. Curran*, 119 F.3d 1150, 1156 (4th Cir. 1997) (statute temporarily restricting direct mail solicitation violated criminal defendants' Sixth Amendment right to counsel); *Cincinnati*, 507 U.S. at 427 (prohibition on use of effective method of communication is a significant restriction of First Amendment rights). Thus, even if the state interests Petitioner asserts were legitimate and substantial (which they are not), section 6254(f)(3) does not directly and materially advance them.

d) Section 6254(f)(3) Is Not Narrowly Tailored.

The fourth prong of *Central Hudson* requires that the speech restriction be no more extensive than necessary to serve the interests that justify it. *See Greater New Orleans*, 119 S. Ct. at 1932; *44 Liquormart*, 517 U.S. at 507-10 (Stevens, J.) (the Court clearly erred in concluding in *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) that it was "up to the legislature" to choose suppression over a less speech-restrictive policy); *id.*

at 524-26 (Thomas, J., concurring); *id.* at 529-32 (O'Connor, J., concurring). Under the central teaching of *44 Liquormart*, the government may not restrict commercial speech to regulate behavior if non-speech-restrictive options are available. *See 44 Liquormart*, 517 U.S. at 507; *see also Greater New Orleans*, 119 S. Ct. at 1934.

Section 6254(f)(3) is not the least restrictive means of achieving the state's purported goals. For example, assuming the state could otherwise meet the *Central Hudson* test, it could allow *arrestees themselves* to opt out of solicitations by checking a box on the arrest form. That solution would advance all of the alleged state interests advocated by Petitioner without prohibiting communications desired by the arrestee. *See* Legis. Hist. at 273-75 (state considered opt-out provision with respect to crime victims). Further, state and federal laws exist (or could be enacted) to preclude the discriminatory use of arrest records without infringing on the First Amendment or the public's access to those records. *See, e.g.*, Cal. Lab. Code § 432.7(a) (making it unlawful for any prospective or actual employer to use arrest information for employment decisions). The state could also engage in counter-speech to control any perceived ills associated with arrestee solicitation. Given the many less restrictive means available to achieve the state's asserted interests, section 6254(f)(3) fails the fourth prong of *Central Hudson*. *See Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637-38 (1980).

C. Section 6254(f)(3) Cannot Survive Strict Scrutiny.

1. Section 6254(f)(3)'s Restriction on Commercial Speech Cannot Survive the Strict Scrutiny Test Should the Court Choose to Apply It.

At least four Justices of this Court have questioned whether courts should review content-based restrictions on truthful commercial speech under a strict scrutiny analysis. (*See* note 9, *supra*.) Strict scrutiny protection for commercial speech is not

a new idea, having been endorsed by Justices Brennan and Blackmun in *Posadas*, 478 U.S. at 350-51 (Brennan, J., dissenting), and *Cincinnati*, 507 U.S. at 438 (Blackmun, J., concurring).[17] Justice Stevens, writing in *44 Liquormart* and joined by Justices Kennedy and Ginsburg, also recently approved this approach, stating, "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process [*i.e.*, prevention of overreaching or deception], there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart*, 517 U.S. at 501. "[N]either the 'greater objectivity' nor the 'greater hardiness' of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference." [18] *Id.* at 502; *see also Greater New Orleans*, 119 S. Ct. at 1936 (Thomas, J., concurring) (quoting *44 Liquormart*, 517 U.S. at 518).

The dangers of discriminating against speech based on content are just as disturbing when the speech is commercial;

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17. *Accord MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994) (recognizing potential application of strict scrutiny test in commercial speech context); *Hornell Brewing Co., Inc. v. Brady*, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *Central Hudson* and strict scrutiny without deciding which is required); *Citizens United For Free Speech II v. Long Beach Township Bd. of Comm'rs*, 802 F. Supp. 1223, 1232 (D.N.J. 1992) ("It is clear from the Supreme Court's recent decision in [*R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992)] that commercial speech must be protected by the usual strictures against content-based distinctions.").

18. *See also* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628 (1990) (arguing the "commercial/noncommercial distinction makes no sense"); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, & Free Speech: The Implications of 44 Liquormart*, 1996 Sup. Ct. Rev. 123, 126 (1996) ("After *Liquormart*, it is unclear why 'commercial speech' should continue to be treated as a separate category of speech isolated from general First Amendment principles.").

indeed, the dangers may be greater given the imprecision with which courts define commercial speech.[19] Additionally, the *Central Hudson* test has proved difficult to apply in practice.[20] *See 44 Liquormart*, 517 U.S. at 526-27; *see also Nordyke*, 110 F.3d at 712 ("the *Central Hudson* test is not easy to apply and the [Supreme Court's] cases summarized above might suggest it is sufficiently flexible to accommodate 'good' commercial speech and to suppress that which is 'not so good' ").

To satisfy the strict scrutiny test, the government must establish the validity of a compelling, subordinating state interest, and that the statute is narrowly drawn to achieve that end. *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939); *see also Buckley*, 424 U.S. 1 (per curiam). The government must meet this burden even if commercial and noncommercial speech

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19. *See, e.g., Central Hudson*, 447 U.S. at 561 (commercial speech is "expression related solely to the economic interests of the speaker and its audience"); *Virginia Pharmacy*, 425 U.S. at 762, 771 n.24 (defining commercial speech as "speech which does 'no more than propose a commercial transaction' ") (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)); *Bolger*, 463 U.S. at 66-67 (requiring courts in mixed speech cases to look to whether the speech: (a) is advertising; (b) makes reference to a specific product; and (c) is motivated by a desire for profits); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding newspaper advertisement soliciting donations for civil rights group is not commercial speech); *Bigelow*, 421 U.S. at 822 (holding an abortion advertisement that does more than simply propose a commercial transaction is fully protected speech); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 787-89 (1988) (holding speech is not necessarily commercial simply because it relates to speaker's financial motive).

20. *Compare Bad Frog Brewery, Inc. v. New York County State Liquor Auth.*, 134 F.3d 87, 99-101 (2d Cir. 1998), and *Nordyke v. Santa Clara County*, 110 F.3d 707, 713 (9th Cir. 1997) (applying the *Central Hudson* test in strict scrutiny fashion), *with Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1311 (4th Cir. 1995) (permitting judicial deference to government censors), *vacated*, 517 U.S. 1206, *on remand*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

are both implicated. *See Schaumburg*, 444 U.S. at 632. The expression of an idea may not be prohibited simply because society finds it offensive or disagreeable. *See United States v. Eichman*, 496 U.S. 310, 319 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

Section 6254(f)(3) could not survive a strict scrutiny analysis for the same reasons it fails the *Central Hudson* test. In *Regan*, 468 U.S. 641, the Court held a federal statute prohibiting the printing or publishing of illustrations of United States currency to control counterfeiting — while allowing it for "philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums" — was a content-based, unconstitutional restriction on speech. *Id.* at 648-49. Allowing the government to approve one photographic reproduction for its newsworthiness or educational value, while disallowing another because the message it conveyed was not newsworthy, "could not help but be based on the content of the photograph and the message it delivers." *Id.* at 648 (citing *Carey*, 447 U.S. at 461).

Likewise, in *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984), this Court struck down a percentage limitation on charitable fundraising expenses. The Court ruled the statute too imprecisely accomplished the state's objective, created an unnecessary risk of chilling free speech, and was subject to facial attack. *Id.* at 965-68. As discussed above, section 6254(f)(3) makes content-based distinctions that substantially impact commercial speech but are not based upon any compelling (or even substantial) state interest. Accordingly, the statute cannot survive strict scrutiny.

2. Section 6254(f)(3)'s Restriction on Substantial Noncommercial Speech Cannot Survive Strict Scrutiny.

Section 6254(f)(3) also inhibits substantial noncommercial speech that falls outside the statutorily approved uses. The statute further chills speech because of its lack of clarity. For example,

may a professor who obtains arrestee addresses for a scholarly purpose thereafter write a book and "indirectly" profit from the information? May a lawyer for a civil rights group who uses arrestee addresses to inform arrestees of their civil rights (presumably a "political" purpose) thereafter file claims and receive attorneys' fees? Does a newspaper that prints arrestee names and addresses have any duty to inquire whether a subscriber purchases the newspaper only for that service, to thereby ensure arrestee addresses are not being used "indirectly" to sell a product?[21]

In this case, section 6254(f)(3) swept within its reach United Reporting's *Register* which discusses law enforcement techniques and criminal defense strategies, and editorializes on state legislation affecting arrestees and law enforcement. (*See* ER 195-202.) As noted above, the lower courts erroneously found the *Register* is commercial speech and therefore refused to apply strict scrutiny to section 6254(f)(3). They also erroneously found United Reporting's information service is commercial speech. While this Court has traditionally defined commercial speech narrowly, the Ninth Circuit's holding now reaches "any 'expression related solely to the economic interest of the speaker and its audience.' " (Pet. App. 28a (quoting *Central Hudson*, 447 U.S. at 561).) *But cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (commercial speech is speech that does "no more than propose a commercial transaction").

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21. Petitioner and amicus's contentions that arrestee names and addresses are "rarely" published is belied by the record. (*See, e.g.*, SER 67-73, 465-547 (the *Sacramento Bee*, *Fresno Bee*, and various other publications throughout the nation routinely publish arrestee names and addresses). *See also* <http://www.ci.nyc.ny.us> (visited July 15, 1999) (Manhattan, N.Y., press releases with arrestee addresses); http://www.legal1.firn.edu/Sarasota/arrests> (visited July 15, 1999) (arrest reports with arrestee addresses).

The Ninth Circuit's characterization of United Reporting's speech as commercial speech jeopardizes all newsletters and information services, and contravenes this Court's decisions that speech does not lose its First Amendment protection simply because it addresses a commercial subject or money is spent to communicate it. *See Virginia Pharmacy*, 425 U.S. at 761-62 (distinguishing pricing information from editorials, or cultural, philosophical, or political speech); *Schaumburg*, 444 U.S. at 631-37 (solicitation is often combined with dissemination of information, discussion and advocacy of public issues, and is so intertwined as to merit the highest First Amendment protection). Newsletters — while historically receiving full First Amendment protection from this Court — may now receive only intermediate scrutiny based on the Ninth Circuit's decision, especially if distributed for compensation or associated with a product or service. S*ee Lowe v. S.E.C.*, 472 U.S. 181, 205 (1985) (investment newsletters containing factual information and commentary, even if distributed for compensation, receive full press protection); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8-9 (1986) (newsletter protection "extends well beyond speech that proposes a business transaction").[22] (*See also* Brief of Amicus Curiae Newsletter Publishers Association, *passim.*) This Court should hold the *Register* is not commercial speech. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504-05 (1984) (a court must conduct de novo review of the record

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22. Section 6254(f)(3) also in effect abridges all direct mail solicitation of arrestees. The argument that alternative forms of advertising are available has been rejected by this Court in other cases. (Brief for the Petitioner at 27.) *See Schneider*, 308 U.S. at 163 (speech cannot be abridged on the plea it may be exercised in some other place); *Linmark Assocs., Inc.*, 431 U.S. at 93; *Spence v. Washington*, 418 U.S. 405, 411 & n.4 (1974) (per curiam); *Regan v. Taxation with Representation*, 461 U.S. at 553 (Blackmun, J., concurring) ("It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him.").

to ensure the speech is properly classified). It should also hold information services such as those United Reporting and amici provide are not commercial speech, since the information itself does not propose any commercial transaction. For the same reasons it cannot pass the *Central Hudson* test, section 6254(f)(3) cannot survive strict scrutiny.

D. Section 6254(f)(3) Unconstitutionally Conditions Receipt of a Governmental Benefit on Surrendering Speech Rights.

Section 6254(f)(3) conditions use of historically public arrest information in the government's possession on the user's relinquishment of speech rights. In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court stated:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech. . . . This would allow the government to "produce a result which [it] could not command directly."

Id. at 597 (citation omitted); *accord Greater New Orleans*, 119 S. Ct. at 1934 (power to prohibit or regulate conduct does not necessarily include power to prohibit or regulate speech about that conduct).[23] Petitioner confuses permissible state

23. This general principle has been broadly applied to welfare payments, *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969), tax exemptions, *Speiser v. Randall*, 357 U.S. 513, 519 (1958), and public employment, *Shelton v. Tucker*, 364 U.S. 479, 487-88 (1960) and (Cont'd)

encouragement or funding of an alternative activity consistent with legislative policy with impermissible direct state interference with a protected interest. *See, e.g., Maher v. Roe*, 432 U.S. 464, 475-76, 487-88 (1977) (restraints making the exercise of fundamental rights more difficult infringe those rights); *Grosjean*, 297 U.S. at 341 and *Arkansas Writers' Project, Inc.*, 481 U.S. at 229-30 (the power to tax speech based on content is the power to destroy it); *FCC v. League of Women Voters*, 468 U.S. 364, 395 (1984) (government may not condition funds on noncommercial television stations' agreement not to editorialize); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (invalidating state-created restrictions on access to contraceptives as burdening the right of privacy). Petitioner's "subsidy" argument also ignores that it has waived its cost-savings argument thereby acknowledging section 6254(f)(3) is not directed at government spending issues.

E. Section 6254(f)(3) Is an Unconstitutional Prior Restraint.

Any official restriction on speech in advance of publication is a prior restraint that carries a "heavy presumption" against its constitutional validity. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976). Prior restraints on speech may be direct (such as a restraining order) or indirect. *See, e.g., Grosjean*, 297 U.S. at 249-50 (additional tax upon publications constituted

(Cont'd)
Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967). *Accord United States v. Kokinda*, 497 U.S. 720, 730 (1990) (restrictions on access to or use of even nonpublic fora must be "viewpoint neutral"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226, 229 (1990) (plurality) (invalidating schemes creating a "risk" of suppressing speech); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 764 (1988) (same); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96, 101 (1972) (same); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 679-80 (1990) (Scalia, J., dissenting) ("It is rudimentary that the State cannot exact as the price of . . . special advantages the forfeiture of First Amendment rights.").

a "deliberate and calculated device . . . to limit the circulation of information"); *United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995) (honoraria prohibition on federal employees abridged speech because it imposed "a significant burden on expressive activity" and on the public's right to read and hear what employees would say).

Here, section 6254(f)(3) criminalizes dissemination of truthful, non-misleading speech that is "directly or indirectly" associated with solicitation and is therefore a prior restraint that violates the First Amendment. *Nebraska Press Ass'n*, 427 U.S. at 558. Even if United Reporting lawfully obtains arrestee names and addresses pursuant to the journalist exception to section 6254(f)(3), it is restrained from selling them to its subscribers.

Section 6254(f)(3) may also vest state officials with discretion to determine whether a particular use of arrestee addresses is allowed by section 6254(f)(3) (which does not define any of the categories of permissible uses). For this additional reason, the statute is unconstitutional. *See FW/PBS*, 493 U.S. at 226 (any statute making the peaceful enjoyment of constitutionally guaranteed freedoms contingent upon the uncontrolled will of an official is an unconstitutional prior restraint).

F. Section 6254(f)(3) Unconstitutionally Criminalizes Accurate Publication of Information From Public Records.

This Court has repeatedly held states may not prohibit or punish the accurate publication of matters contained in public records. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975);[24] *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989); *Smith v. Daily*

24. In *Cox*, the Court observed that "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Id.* at 493.

Mail Publ'g Co., 443 U.S. 97 (1979); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977). Section 6254(f)(3) outlaws the use of even lawfully obtained arrestee addresses for non-approved speech and is unconstitutional under *Cox Broadcasting* and its progeny.

II. ACCESS TO ARREST RECORDS SHOULD BE GUARANTEED UNDER THE FIRST AMENDMENT.

A. The Public Has a Fundamental Interest in Access to Arrest Records.

1. There Is a Substantial History of Public Access to Arrest Records to Preserve the Integrity of the Criminal Justice Process.

Even if section 6254(f)(3) is viewed as an access restriction, it contravenes the First Amendment guarantee that *every person* shall retain the means to oversee core governmental functions such as arrests. Public arrest records provide "valuable protection against secret arrests and improper police tactics." *Wainwright v. City of New Orleans*, 392 U.S. 598, 606 (1968) (Warren, C.J., dissenting); *see also Davis v. North Carolina*, 310 F.2d 904, 910 (4th Cir. 1962) (Haynsworth, J., dissenting); *Engrav v. Cragun*, 236 Mont. 260, 267 (1989); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186 (Tex. App. 1975). "In the 'low-visibility' sphere of police investigatory practices, there are obvious and compelling reasons why official records should prevail over the second-guessing of lawyers and judges." *Wainwright*, 392 U.S. at 606. Secret arrest records hinder the public's ability to monitor arrests — " 'an important aspect of the overriding concern with preserving the integrity of the law enforcement and the judicial processes.' " *Lanphere*, 21 F.3d at 1519 (Aldisert, J., dissenting) (quoting *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985)); *see also United States v. Ross*, 259 F. Supp. 388, 390 (D.D.C. 1966) (open arrest records, including the name and address of

the arrestee, ensure the public's ability to guard against abuse of the arrest power).

Public arrest records serve other valuable purposes. For example, they may aid in the identification and apprehension of criminals, help solve neighborhood crime by documenting previous area arrests, and assist in filling sensitive employment positions. *See, e.g., Loder*, 17 Cal. 3d at 864-66; *Ernst v. Parkshore Club Apartments Ltd. Partnership*, 863 F. Supp. 651, 656-57 & n.3 (N.D. Ill. 1994).

From at least the time of the Magna Carta and the formalization of the writ of habeas corpus, concealment of arrest information has been an odious concept in our society. *See, e.g., Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 438 (1979). (*See also* Brief of Amicus Curiae Investigative Reporters Editors, Inc., *passim*.) The historical right of access to arrest and other criminal justice records is now deeply embedded in our common law. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 & nn.7-8 (1978). The right is found "in the citizen's desire to keep a watchful eye on the workings of public agencies." *Id.*; *see also id.* at 616 n.5 (Stevens, J., dissenting) (the risk that government information will be reproduced and exploited for commercial purposes is "a risk the Founding Fathers accepted in adopting the free speech protections of the first amendment"). Many states ensure access to public records (including arrest records) by statute. *See, e.g.*, Mass. Regs. Code tit. 950 §§ 32.05 *et seq.*; Ore. Rev. Stat. § 192.501 (1997); N.C. Gen. Stat. § 132-1.4(c)(2) (1997). Others have elevated access to public records to a constitutional right. *See, e.g.*, Tennessee (Tenn. Const. art. 1, § 19); Louisiana (La. Const. art. XII); Montana (Mont. Const. art. II, § 9).

California has also recognized the public's fundamental right to open arrest records. *See Loder*, 17 Cal. 3d at 864-66 (identifying a "compelling interest" in the retention and dissemination of arrest records, the benefits of which include a more efficient law enforcement and criminal justice process,

identification of arrestees, protection of the public from recidivist offenders, and potential discovery of further evidence). The *Loder* court noted that prompt and accurate public reporting of an arrest does not violate the suspect's privacy rights. *Id.* at 865. It also recognized the dangers of inaccurate or incomplete arrest record disclosure outside the criminal justice system, but noted extensive legislation had been enacted to avoid those dangers. *Id.* at 868-75.

Petitioner and amici argue against any constitutional right of access to arrest record information by analogizing to other governmental records as to which states or the federal government have restricted public access. Because they document a crucial step in the exercise of the state's police power, however, arrest records cannot legitimately be compared with welfare rolls, *see, e.g.*, 45 C.F.R. § 205.50 (1998), or marriage and divorce records, *see, e.g.*, Md. Code Ann., State Gov't § 9-1015 (1997), or motor vehicle registration information, *see, e.g.*, 18 U.S.C. §§ 2721, 2722 (1998), or driving records, *see, e.g.*, 75 Pa. Cons. Stat. § 6114 (1997). There likewise can be no legitimate comparison between an arrestee's privacy concerns and those of persons receiving public assistance, *see, e.g.*, Ind. Code Ann. § 12-14-22-8 (Michie 1998), or that of a military reserve officer in the information contained in a "financial disclosure report" required under federal regulations, *see, e.g.*, 32 C.F.R. § 84.21 (1998).

As Circuit Judge Aldisert noted in his dissent in *Lanphere*, 21 F.3d at 1516-20, this Court has afforded an expansive First Amendment right of access to the criminal justice process, both because its historic " 'tradition of accessibility implies the favorable judgment of experience' " and because public access plays a significant role in its functioning. *Id.* at 1516 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring))); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-*

Enterprise I"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"). None of the other state or federal laws to which Petitioner and Amici refer involve arrest records or present the same constitutional issues as does section 6254(f)(3).

Petitioner and Amici also rely on Freedom of Information Act ("FOIA") cases involving records that generally have no bearing on the need for an informed citizenry or public scrutiny. *See, e.g., Minnis v. United States Dep't of Agric.*, 737 F.2d 784 (9th Cir. 1984) (travel permits); *Department of Air Force v. Rose*, 425 U.S. 352 (1976) (Air Force Academy Honor and Ethics Code files); *United States Dep't of State v. Ray*, 502 U.S. 164 (1991) (interviews of Haitian nationals); *Wine Hobby USA, Inc. v. United States I.R.S.*, 502 F.2d 133 (3d Cir. 1974) (persons registered with the Bureau of Alcohol, Tobacco and Firearms to produce wine for family use). *Reporter's Committee*, 489 U.S. 749, is also inapposite. As this Court noted, "[p]lainly there is a vast difference between the public records that might be found after a diligent search of . . . local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 764. Likewise, cases upholding use restrictions on information collected by private parties and subject to government compelled disclosure are inapposite. *See, e.g., Federal Election Comm'n v. International Funding Inst., Inc.*, 969 F.2d 1110 (D.C. Cir. 1992); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537-39 (1987).

2. Public Access to Arrest Records Also Protects an Arrestee's Constitutional Rights.

An arrest represents a powerful discretionary exercise of the state's police power and implicates the accused's fundamental constitutional rights. *See Terry v. Ohio*, 392 U.S. 1, 26 (1968); *United States v. Robinson*, 414 U.S. 218 (1973) As this Court noted in *Reporter's Committee*, 489 U.S. at 753-

54, "arrests, indictments, convictions, and sentences are public events. . . ." Open arrest records facilitate direct mail advertising and the communication of other vital information by lawyers, counselors and others that protect arrestees' Fifth and Sixth Amendment rights.[25] (*See* Section I(B)(2)(c), *supra*.) *Shapero*, 486 U.S. at 472. Even Judge Aldisert recognized in *Lanphere*, 21 F.3d at 1518, that direct solicitation may facilitate legal representation for individuals whose fundamental rights are at risk.

B. The Selective Disclosure of Information Based on the Speaker's Identity or Purpose Has Never Passed Constitutional Muster.

This Court has invalidated speech restrictions that are based on a person's identity or the content of the message. *Arkansas Writers' Project, Inc.*, 481 U.S. at 229-30 (government's power to impose content-based financial disincentives based on the speaker's identity must meet the compelling interest test); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (regulations directed at a business solely on the basis of content are presumptively unconstitutional). It is also unconstitutional for the government selectively to exclude some speakers from access to information

25. This Court emphasized the utility of direct mail concerning professional services in *Bates*, 433 U.S. at 370 nn.22-23. The Court cited *The Report of the Special Committee on the Availability of Legal Services, printed in* ABA's Revised Handbook on Pre-Paid Legal Services, at 26 (1972), which found many people forego counsel because they fear legal services are too expensive. The report also concluded the vast majority of people feel they cannot determine which lawyers are competent to handle their problems. The 1994 follow-up survey commissioned by the ABA, *Legal Needs and Civil Justice, A Survey of Americans, printed in* ABA's Revised Handbook on Pre-Paid Legal Services (1995), similarly found that most legal needs of low and moderate income households are not met by the civil justice system in part because people do not know how to find a lawyer. (*See* Notice of Lodgment at 339, 347).

freely available to others. *See, e.g., Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) (selective disclosure allows government to influence public debate, a practice at odds with the First Amendment); *accord American Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977); *McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951). *See also First Nat'l Bank of Boston*, 435 U.S. at 785 (discriminatory restrictions may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to people"); *Consolidated Edison Co. v. Public. Serv. Comm'n*, 447 U.S. 530, 538 (1980) (through a general speech restriction and its exemptions, the government might seek to select the "permissible subjects for public debate" and thereby to "control . . . the search for political truth"); *Cincinnati*, 507 U.S. at 424-26 (exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy in diminishing the credibility of the government's rationale for restricting speech in the first place). Section 6254(f)(3) selectively denies the use of lawfully obtained arrest information for commercial and other disfavored speech and is unconstitutional on this additional ground.[26]

Likewise, neither the Freedom of Information Act ("FOIA") nor most state statutes allow selective distribution of public record information based upon the identity of the speaker or the reason for the request. *See Reporter's Committee*, 489 U.S. at 771-72 (1989) ("Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].' ") (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)); *Department of Air Force*, 425 U.S. at 372 (a request must turn

26. Some states do permit a charge for commercial and other uses to reflect the actual cost of making the records available. *See, e.g.*, Minn. Stat. Ann. § 13.03(3) (West 1999) (allowing developmental costs). Thus, while California could constitutionally require commercial users to reimburse the state for the actual cost of duplicating arrest records, it cannot constitutionally deny them the use of those records.

on the basic purpose of FOIA to open government action to public scrutiny rather than on the particular purpose for which the document is being requested); *Nixon*, 435 U.S. at 592 (recognizing discriminatory access by government has never been constitutionally acceptable).[27]

C. First Amendment Protection Should Be Extended to Arrest Records to Ensure Scrutiny of the Core Government Function of Arrest.

1. The Substantial History of Public Access to Arrest Records Satisfies the First Prong of the Test for Affording a Constitutional Right of Access.

The historic importance of an open criminal justice system, coupled with the need for citizens to monitor and participate in government, caused this Court in 1980 to mandate a constitutional right of access to certain core criminal justice information — a protection that has been expanded and strengthened in the intervening years. In the "watershed case" of *Richmond Newspapers*, 448 U.S. at 576, this Court made clear that the First Amendment prevents government from denying access to criminal trial proceedings absent a finding that closure is essential to preserve a more compelling interest. The Court stated: "Today . . . for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 569, 583; *accord Press-Enterprise I*, 464 U.S. at 508-09; *Press-Enterprise II*, 478 U.S. at 12-13 (extending the presumption to preliminary hearings); *Waller v. Georgia*, 467

27. *See also* Kenneth C. Davis, Administrative Law §§ 3A.4-3A.5 (1st ed. Supp. 1970), *cited in Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 656 n.9 (1974) (noting FOIA never allows for balancing based upon the special needs of private parties); Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law § 5.3 (3d ed. 1994) (records not exempt must be disclosed to all).

U.S. 39, 46-47 (1984) (extending right of access to pretrial suppression hearings outside the presence of a jury).[28]

This First Amendment protection has been extended by the First, Second, Fourth, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits (as well as numerous district and state courts) to ensure public access to various criminal records, including plea agreements, presentencing documents, names and addresses of jurors after trial, search warrants and supporting affidavits, arrest incident information, voir dire questionnaires and confessions.[29] The history of public arrests supports extending a constitutional right of public access to arrest records. Indeed, even the Solicitor General acknowledges "a governmental decision not to provide any information" about arrests could prove troublesome given the "historic tradition of

28. Petitioner's reliance on pre-1980 cases — before the First Amendment right of access was established — is misplaced. In *Richmond Newspapers*, this Court distinguished a number of pre-1980 cases including *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Washington Post. Co.*, 417 U.S. 843 (1974); *Zemel v. Rusk*, 381 U.S. 1 (1965); *accord Nixon*, 435 U.S. at 609. As Justices Brennan and Marshall commented, such decisions stand only for the proposition that a privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality. *Id.* at 586-87. These cases "neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it." *Id.* at 586.

29. *See, e.g., Phoenix Newspapers, Inc. v. District Court*, 156 F.3d 940 (9th Cir. 1998); *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993); *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991); *Oregonian Publ'g Co. v. District Court*, 920 F.2d 1462 (9th Cir. 1990); *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989); *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989); *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986).

making public at least some information about the exercise of that core government power." (Solicitor General's Brief at 27 n.15.) *Accord Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (the nation's historic distrust of secret proceedings and their inherent dangers implicate a major purpose of the First Amendment—"discussion of governmental affairs").

2. The Function Prong of the Test for Affording Constitutional Access to Arrest Records is Also Satisfied.

The second prong of the First Amendment test looks to "whether public access . . . plays a particularly significant positive role in the actual functioning of the process." *Press-Enterprise II*, 478 U.S. at 11. "[T]he First Amendment . . . has a structural role to play in securing and fostering our republican system of self-government." *Richmond Newspapers*, 448 U.S. at 587 (Brennan & Marshall, JJ., concurring) (citations omitted). "The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication." *Id.* at 587-88.

As this Court has recognized, an open criminal justice system increases public confidence, quality and fairness in the system, protects against discriminatory and retaliatory behavior, and improves the conduct of public servants by subjecting them to public scrutiny. *Richmond Newspapers*, 448 U.S. 555 *passim*; *Press-Enterprise I*, 464 U.S. 501 *passim*; *Press-Enterprise II*, 478 U.S. 1 *passim*; *see also Breier*, 89 Wis. 2d at 438 (information concerning the operation of police is vital to our democratic system and an integral part of constitutional due process); *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 112 (1976) (Corrigan, Celebrezze, & Brown, JJ., concurring) (same); *Morrow v. District of Columbia*, 417 F.2d 728, 741-42 (D.C. Cir. 1969) (requirement of open arrest books

is to prevent "secret arrests") (citing H.R. Rep. No. 83-2332 (1954) (requiring precinct arrest books to be public)). Curbing abuse by law enforcement[30] is possible only if citizens can learn how arrest power is exercised. *See, e.g., Lanphere*, 21 F.3d 1508, 1519 (Aldisert, J., dissenting) (arguing a First Amendment right of access to arrest records is a compelling interest that cannot be overridden by concerns of preserving integrity of law enforcement); *Houston Chronicle Publ'g Co.*, 531 S.W.2d 177; *Herald Co. v. McNeal*, 553 F.2d 1125 (8th Cir. 1977) (discussing a colorable constitutional right of access to police arrest registers); *Student Press Law Ctr. v. Alexander*, 778 F. Supp. 1227, 1234 (D.D.C. 1991) (finding a probability of success on the merits of establishing a First Amendment right of access to campus police arrest and incident reports).

Petitioner has established no legitimate state interest, much less an "overriding" one, to justify ignoring the fundamental need for public scrutiny of the arrest function. Accordingly, this Court should hold there is a First Amendment right of access to arrest records, a right unconstitutionally infringed by section 6254(f)(3).

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30. *See, e.g.*, Editorial, *A Guilty Plea to Shocking Violence*, Sun-Sentinel, May 26, 1999, at 22A; International News, *Thousands Protest N.Y. Police Brutality*, Deutsche Presse-Agentur, August 29, 1997; Erin Texeira, *Washington Protest Decries Police Brutality*, Baltimore Sun, April 4, 1999, at 3A; *see also* numerous recent cases alleging police abuse, such as *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997); *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998); *Smith v. City of Chicago*, No. 97-C-0763, 1999 WL 162811, at *1 (N.D. Ill. 1999); *Perkins v. City of Chicago*, No. 97-C-2389, 1998 WL 89296, at *1 (N.D. Ill. 1998).

III. SECTION 6254(f)(3) VIOLATES THE FOURTEENTH AMENDMENT EQUAL PROTECTION AND DUE PROCESS GUARANTEES.

A. Section 6254(f)(3) Denies United Reporting Equal Protection Under the Law.

The Fourteenth Amendment prohibits states from denying any person "equal protection of the laws." Legislative classifications may not constitutionally infringe upon the exercise of a "fundamental right," and all persons in similar circumstances must be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); s*ee also Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J. concurring).

Discriminatory burdens on First Amendment rights are subject to strict scrutiny, whether analyzed under the First Amendment or the equal protection clause. *See, e.g., Arkansas Writers' Project, Inc.*, 481 U.S. at 229; *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) ("*Mosley*"). "[F]or equal protection purposes, [a statute's] impingement need not violate the First Amendment directly; its differential effect upon various speakers can in and of itself violate the Equal Protection Clause, even if the regulation is permissible under the underlying substantive constitutional provision." *Special Programs, Inc. v. Courter*, 923 F. Supp. 851, 857 (E.D. Va. 1996), *relying on Mosley*, 408 U.S. 92 and *Plyler*, 457 U.S. 202 (holding that classifications infringing the ability to solicit are subject to strict scrutiny).

The state has the burden of showing any restriction impacting speech is narrowly tailored to achieve a compelling, subordinating state interest. When legislation affecting speech is underinclusive or penalizes conduct that is indistinguishable in view of the law's ostensible purpose, it raises suspicion that the law's true target is the *message* of the restricted speech, a violation of the First Amendment. *See News America Publ'g,*

Inc. v. F.C.C., 844 F.2d 800, 805 (D.C. Cir. 1988) ("The Supreme Court has recently hinted at a readiness to infer censorial intent from legislative history and to invalidate laws so motivated") (citing *Minneapolis Star*, 460 U.S. at 579-80).

Here, as discussed above, section 6254(f)(3) imposes a substantial limitation on speech. It criminalizes the use of arrestee address information for solicitation but allows it for numerous other purposes that are just as likely to invade arrestees' privacy. Moreover, there is no reason to treat United Reporting's *Register* differently than any other scholarly or journalistic newsletter, and Petitioner has offered none.[31]

A court can find unconstitutional discrimination even without evidence of an improper censorial motive. *Arkansas Writers' Project, Inc.*, 481 U.S. at 228. Here, however, section 6254(f)(3) was carefully crafted to burden commercial solicitation, while accommodating the economic interests of certain powerful groups. *See* Legis. Hist. (June 4, 1996 letter) at 4 ("While these records are justifiably public in many ways, the unsolicited direct mail advertisements are unwarranted."). Thus, even if legislative motive were necessary, section 6254(f)(3) is unconstitutional.

B. Section 6254(f)(3) Denies United Reporting and Others Due Process of Law.

The Fourteenth Amendment also forbids states from depriving any person of personal rights without due process of law, and from enacting arbitrary and unreasonable legislation infringing constitutional rights. Freedom of speech and press fall within due process protection even where "the dissemination

31. Contrary to Petitioner's contention, this issue is indeed before the Court as United Reporting could not sign the declarations required by section 6254(f)(3) for fear of criminal liability. (ER 192; SER 441-42.) *See Greater New Orleans*, 119 S. Ct. 1928 (but for threat of sanctions, Petitioners would broadcast advertisements for private casinos).

takes place under commercial auspices." *Smith v. California*, 361 U.S. 147, 149-50 (1959); *see Baggett v. Bullitt*, 377 U.S. 360, 367 (1964).

The failure of a statute impacting free speech to give fair notice of prohibited acts violates procedural due process rights. *See Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961) (the vice of unconstitutional vagueness is aggravated where a statute operates to inhibit individual freedoms protected by the Constitution); *NAACP v. Button*, 371 U.S. 415, 432 (1963) (courts may not presume ambiguous statutes curtail as little constitutionally protected conduct as possible). Vagueness in speech regulations also creates an impermissible risk of discriminatory enforcement. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Statutes that broadly prohibit speech are also facially invalid under the due process overbreadth doctrine. In *Chicago v. Morales*, 119 S. Ct. 1849 (1999), this Court invalidated a loitering prohibition that was vague in scope and encompassed a "great deal of harmless behavior."[32] *Id.* at 1851. The Court underscored that vagueness may invalidate a criminal law where: (a) it fails to provide notice enabling ordinary people to understand what conduct it prohibits; or (b) it authorizes arbitrary and discriminatory enforcement. *See id.* at 1859.

Section 6254(f)(3) exhibits the same deficiencies. Petitioner has not proved California has *any* interest in protecting arrestee addresses, much less the substantial interest required by the Fourteenth Amendment. United Reporting and others have been forced to forego fundamental rights of free speech for fear of criminal prosecution, due in part to the vagueness of section 6254(f)(3). (ER 189-94.) Indeed, section 6254(f)(3)'s vagueness has a chilling effect even on those whose speech California may

32. The Court declined to apply the overbreadth doctrine where the term "loiter" did not prohibit any form of conduct intended to convey a message and specifically excluded assemblies designed to demonstrate a group's support of, or opposition to, a particular point of view. *Id.* at 1857.

have intended to allow. *See Baggett*, 377 U.S. at 372. "The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [citizens] what is being proscribed." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

Section 6254(f)(3)'s prohibition on the use of arrestee addresses "directly or indirectly" to sell a product or service (also undefined) raises additional vagueness concerns. Liability for perjury may attach even though the disseminator of the information was not involved in the later commercial use. Section 6254(f)(3) conceivably places United Reporting and others in the impossible position of predicting (at risk of criminal prosecution) whether a subsequent acquirer will misuse arrestee addresses. *See Baggett*, 377 U.S. at 369.[33]

IV. SECTION 6254(f)(3) ALSO VIOLATES THE CALIFORNIA CONSTITUTION.

Article I, section 2 of the California Constitution provides even broader, more expansive protection for speech than does the First Amendment. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *see also Wilson v. Superior Court*, 13 Cal. 3d 652, 658 (1975); *Blatty v. New York Times*, 42 Cal. 3d 1033, 1041 (1986). Given the California Supreme Court's determination that there is an overriding public interest in identifying and notifying the public of arrestees charged with crimes, California's broader free speech guarantee provides yet another (independent) basis for invalidating section 6254(f)(3).

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33. Section 6254(f)(3) is likewise unconstitutional on overbreadth grounds. The statute is an outright ban on commercial solicitation, conduct protected by the First Amendment. A law is facially invalid if it "does not aim specifically at evils within the allowable area of State control but . . . sweeps within its ambit other activities" which are protected by the First Amendment. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Ninth Circuit Court of Appeals and hold section 6254(f)(3) is unconstitutional.

Respectfully submitted,

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